

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

KENNETH CRAIN
ADC # 147861

PETITIONER

v.

No. 5:13-cv-341-DPM

WENDY KELLEY, Director, ADC*

RESPONDENT

ORDER

Crain moves for relief under Rule 60(b)(6). His primary argument is that the United States Court of Appeals' decision in *Sasser v. Hobbs* changed the procedural law that applies to his defaulted claims. 735 F.3d 833 (8th Cir. 2013). But this Court didn't invoke procedural default in analyzing Crain's ineffectiveness claims; they were addressed on the merits under 28 U.S.C. § 2254(d). *Martinez v. Ryan*, 566 U.S. 1, 17 (2012); *No. 14 at 5-8 & No. 16*. And *Sasser* was handed down months before this Court decided Crain's *habeas* petition; it didn't change the law that this Court applied.

Crain's actual innocence argument fails, too. It's not clear that *Schlup* applies in this situation. *E.g., Brooks v. Yates*, 818 F.3d 532, 533-34 (9th Cir. 2016) (*per curiam*). But even if it does, Crain hasn't pointed to

*Wendy Kelley is the current director of the Arkansas Department of Correction. The Court directs the Clerk to amend the docket. FED. R. CIV. P. 25(d).

any “new reliable evidence which was not available at trial through the exercise of due diligence.” *Kidd v. Norman*, 651 F.3d 947, 953 (8th Cir. 2011).

Crain’s motion for Rule 60(b) relief, *No* 18 & *No* 19, is denied. No certificate of appealability will issue. 28 U.S.C. § 2253(c)(1)-(2).

So Ordered.

D.P. Marshall Jr.
D.P. Marshall Jr.
United States District Judge

14 May 2018